

July 23, 2004

Michael Asimow
Professor of Law Emeritus
UCLA Law School
Los Angeles, CA 90095-1476

Dear Professor Asimow:

I appreciate the invitation in Section Chair Bill Funk's letter to comment on the "circulation draft" of an assessment of the need for changes to the Administrative Procedure Act (APA), prepared by the ABA's Section of Administrative Law and Regulatory Practice. I thank you for the opportunity and offer several comments for the Section's consideration.

The Section proposes to amend the APA to establish a new "default rule" for hearings pursuant to which any future legislation requiring agency hearings will be presumed to require formal "on the record" trial-type hearings unless Congress explicitly provides otherwise in the legislation itself. In addition, the proposed revision would specify that for any agency "evidentiary proceeding," a party is entitled to present its case "orally or in writing," and would extend to all agency hearings the opportunity for cross-examination by the parties. The whole direction of the Section's proposal -- from less formal to more formal hearing procedures -- runs counter to the direction that the Nuclear Regulatory Commission (NRC) and other agencies have sought to take in recent years. The Section's proposal appears not to recognize that the expense and complexity of these more formal, inflexible approaches may actually be overly burdensome and costly for some non-lawyer members of the public who seek to participate in agency adjudications. Rather than improving the APA, the Section's proposal would have the unfortunate effect of "ossifying" - to borrow Professor Gary Edles' word - the adjudicatory process and staffing innovations. The arguments against the proposal articulated in Professor Edles' article in the Fall 2003 issue of the *Administrative Law Review* are, in my view, compelling. We believe the current APA hearing process provides appropriate protections for hearing participants and there is no obvious need for the sorts of changes that the Section proposes.

The Section also proposes to amend the APA to redefine "rule" to exclude requirements "of particular applicability." Again, there is no compelling reason for the change. This revision could be especially troublesome for the NRC, as we currently have a number of rules, all properly promulgated under current APA notice and comment rulemaking procedures, that

might be argued to be “of particular applicability.” Rather than settling a perceived interpretive conundrum, the change is likely to provide fertile ground for new disputes. The existing APA rulemaking process has worked well and has been well-defined and appropriately refined through more than 50 years of judicial scrutiny. We know of no good reason to modify that process and introduce uncertainty and instability in federal regulatory practice.

Again, I appreciate the opportunity to provide views and I hope that the Section will consider our comments.

Sincerely,

/RA/

Stephen G. Burns
Acting General Counsel

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Again, I appreciate the opportunity to provide views and I hope that the Section will consider our comments.

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Stephen G. Burns
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